In the United States Court of Federal Claims

NOT FOR PUBLICATION
No. 03-1677C
(Filed April 2, 2007)

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*
WILLIAM P. GREENE, *
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Plaintiff, *
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v. *
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THE UNITED STATES, *
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Defendant. *
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MEMORANDUM OPINION AND ORDER

The plaintiff, William P. Greene, acting *pro se*, brought this action against the United States regarding his involuntary separation from the United States Army Reserve. Following transfer of the case to this Court from the United States District Court for the District of Connecticut, the United States moved to dismiss Mr. Greene's complaint pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC") for failure to state a claim upon which relief could be granted or, in the alternative, for judgment on the administrative record pursuant to former RCFC 56.1.[1] On April 29, 2005, this Court granted the government's motion to dismiss, except as to two specific back pay-related claims regarding Mr. Greene's retroactive promotion to the rank of First Lieutenant and Mr. Greene's performance of drills between July 1991 and January 1992. The Court also granted the government's motion for judgment on the administrative record concerning Mr. Greene's claim for student loan repayment by the Army. *Greene v. United States*, 65 Fed. Cl. 375 (2005).

Mister Greene has requested that this Court reconsider its decision on the student loan repayment issue, and has separately moved for reconsideration of the Court's purported "dismissal of due process violations." And although he has received payments from the government in response to the Court's decision regarding the back pay claims, Mr. Greene requests further back pay according to additional calculations he has submitted. The government has replied to this request by moving for leave to submit a supplemental audit and for an order

[1] As of June 20, 2006, RCFC 56.1 has been replaced by new RCFC 52.1

that Mr. Greene supply any further documentation in support of his subsequent back pay claims within sixty (60) days.

As explained below, the Court DENIES Mr. Greene's motion for reconsideration of the student loan repayment issue and his motion concerning the due process claims he now avers were a part of his complaint. The Court GRANTS Mr. Greene's motion to add his submitted calculations to the record, and the government's motion for leave to file its supplemental audit, and agrees with the suggestion that Mr. Greene's filing be considered a motion for judgment on the administrative record. Mister Greene is given sixty days from the date of this order to submit any additional evidence and arguments in support of his claims for additional back pay.

I. BACKGROUND

A full recitation of the facts surrounding Mr. Greene's initial complaint is set out in the Court's earlier decision in this case. *Greene*, 65 Fed. Cl. at 376-78. Pursuant to that decision, the Defense Finance and Accounting Service (DFAS), the U.S. Department of Defense's accounting branch, audited Mr. Greene's personnel records to determine the amount owed to Mr. Greene. Calculating that Mr. Greene was owed $3,195.05, DFAS tendered payment in that amount to Mr. Greene on June 29, 2005. The Court held a status conference on July 28, 2005, and determined that each party should submit a status report explaining its calculation of the back pay owed under the Court's prior ruling. Mister Greene was also given the opportunity to move for reconsideration of his claims for student loan repayment.

The government filed a status report on August 17, 2005 explaining how DFAS made its calculations. On August 25, 2005, the government filed a supplemental status report outlining how DFAS had determined that Mr. Greene was also owed $63.60 as a refund of fees and penalties assessed against him. The government promptly paid this amount to Mr. Greene as well.

On September 2, 2005, Mr. Greene moved for the Court to reconsider its judgment on the administrative record pertaining to the issue of whether the Army owed him money for the repayment of student loans. He also moved for extra time in which to file a motion to reconsider back pay and other matters (presumably including the previously-ordered status report). The motion was granted, and on November 21, 2005 Mr. Greene mailed a motion for reconsideration of "the dismissal of due process violations," and a motion for an additional extension of time to address back pay issues. Although received late, these were filed by leave of Court on December 5, 2005.

The Court, by order dated March 24, 2006, granted Mr. Greene leave to file a status report concerning back pay calculations on or by April 7, 2006. Four days later, the Court requested briefing from the government on the student loan repayment issues. Both parties subsequently requested extensions of time, which were granted. The government filed its brief within the requested time, but Mr. Greene's filing was attended with additional delay. The Court

ultimately received and filed Mr. Greene's "Motion to Submit Plaintiff's Back Pay Calculation" on May 30, 2006. After some delay, the government responded with a document that construed Mr. Greene's back pay submission as a motion for judgment on the administrative record. The government requested that Mr. Greene's submission be filed, that it be given leave to file a supplemental audit (attached in an appendix), and that Mr. Greene be given sixty days in which to supply any further evidence and arguments supporting his additional back pay claims. Mister Greene has not responded to this motion.

II. DISCUSSION

A. Jurisdiction and Applicable Standards of Review

Pro se plaintiffs receive more latitude in their pleadings and courts do not hold them to the rigid standards and formalities imposed upon parties who benefit from representation by counsel. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). But such plaintiffs are not immunized from having to plead facts underlying a valid claim. *Paalan v. United States*, 57 Fed. Cl. 15, 16 (2003). Consequently, these plaintiffs must still "comply with the applicable rules of procedural and substantive law." *Walsh v. United States*, 3 Cl. Ct. 539, 541 (1983), *citing Faretta v. California*, 422 U.S. 806, 835 n.46 (1975).

Congress, via the Tucker Act, has placed within this Court's jurisdiction "any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2000). The Tucker Act, however, is only a "jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Therefore, in order to pursue a substantive right, a plaintiff must plead an independent contractual relationship, constitutional provision, federal statute, or executive agency regulation that provides a substantive right to money damages for the Court to exercise jurisdiction. *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004); *Roth v. United States*, 378 F.3d 1371, 1384 (Fed. Cir. 2004). The statute of limitations for any such claim is six years from the date of accrual. 28 U.S.C. § 2501 (2006). Additionally, this Court may not exercise jurisdiction over "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." 28 U.S.C. § 1500 (2006).

Rule 59(a)(1) affords this Court the discretion to reconsider its decisions in regard to "all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RCFC 59(a)(1). A motion for reconsideration, however, does not constitute an opportunity for an "unhappy litigant . . . to sway" a court. *Froudi v. United States*, 22 Cl. Ct.

290, 300 (1991). Nor may any party -- including one appearing *pro se* -- prevail on such a motion by raising an issue for the first time when the party could have done so when the issue was first available to be litigated. *Lamle v. Mattel*, 394 F.3d 1355, 1359 n.1 (Fed. Cir. 2005). To prevail on a motion for reconsideration, then, a party must indicate a manifest error of law or fact on a court's part. *Pacific Gas & Elec. Co. v. United States*, 58 Fed. Cl. 1, 2 (2003). Specifically, the party must show either: a) an intervening change in controlling law; b) the availability of previously unavailable evidence; or c) the necessity of allowing a motion in order to prevent manifest injustice. *Griswold v. United States*, 61 Fed. Cl. 458, 460-61 (2004).

B. The Motion to Reconsider the Student Loan Repayment Claim

In its initial opinion, the Court upheld the decision of the Army Board for Correction of Military Records ("ABCMR") to deny Mr. Greene's request for student loan repayment. *Greene*, 65 Fed. Cl. at 384-85. Although the ABCMR did not expressly address this claim in its decision, *see* Admin. R. at 296-304, the Court independently reviewed the record and found "insufficient evidence in the record demonstrating that Mr. Greene is entitled to student loan repayment or, quite frankly, indicating the exact nature of Mr. Greene's student loan repayment claim." *Greene*, 65 Fed. Cl. at 385. For purposes of that review, the Court assumed that the particular student loan program under which Mr. Greene claimed he was owed repayment was money-mandating, and that the statute of limitations had not run on the claim. *Id.* at 384.

Recognizing that controlling Federal Circuit precedent allows plaintiffs such as Mr. Greene to supplement the record with evidence that was not before a correction board, *see Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983), and mindful of plaintiff's *pro se* status, the Court allowed Mr. Greene the opportunity to submit additional evidence with his motion for reconsideration. *See* Order (Aug. 1, 2005). With his motion, Mr. Greene submitted six documents. The first, a "Report of Separation and Record of Service," is also found in the Administrative Record. *See* Admin. R. at 52. This document lists the terms "SLRP [Student Loan Repayment Program] Program" and "Enlistment Bonus" without further explanation in a block entitled "Remarks." According to Mr. Greene, this notation "defines what enlistment incentives the Plaintiff received and that transferred with him to the U.S. Army Reserve." Mot. to Reconsider Claims at 1-2. The second document is described by him as "a printout from NELNET the student loan holder." *Id.* at 2. It appears from this document that NELNET may have submitted repayment forms to the Army on February 13, 1989 and December 1, 1989. *See* App. to Mot. to Reconsider Claims at 2-3.[2]

The third document, also contained in the Administrative Record, *see* Admin. R. at 284, is a September 15, 1993 memorandum from Mr. Greene which states, *inter alia*, that his "[l]oan holder sent SLRP paperwork" in "1989-90." The fourth document, a version of which is also in the record, *see* Admin. R. at 104, is a November 9, 1993 memorandum from his then-Unit

[2] The attached documents were not paginated. The page numbers are supplied by the Court (omitting from the count the duplicate copies of the first and fourth documents).

Administrator informing Mr. Greene that he had incorrectly filled out six SLRP Annual Repayment Applications. The fifth document, already in the record, *see* Admin. R. Add. at 292, is a May 23, 1995 letter from the Army's Office of the Inspector General, informing Mr. Greene that an "inquiry" was being "conduct[ed]" into his "outstanding issues" relating to the SLRP. And the sixth document is a collection of DoD Educational Loan Repayment Program (LRP) Annual Application forms, which were reportedly "completed by NELNET on December 17, 1996." Mot. to Reconsider Claims at 2. These forms appear to request repayment of loans used to attend the University of Lowell during the 1980-81 and 1983-84 school years; Northern Essex Community College in the 1981-82 and 1982-83 school years; and the University of Massachusetts in the 1984-85 and 1985-86 school years. *See* App. to Mot. to Reconsider Claims at 12-23. Presumably, these are the revised versions of the six forms referenced in November 9, 1993 memorandum.

The motion for reconsideration contains no analysis of the legal issues pertaining to Mr. Greene's claims for student loan repayment, other than the conclusory statement that "the Plaintiff is entitled to Student Loan Repayment by contract." Mot. to Reconsider Claims at 2. But such a contract claim lacks any support in law. The U.S. Supreme Court has long recognized that "common-law rules governing private contracts have no place in the area of military pay." *Bell v. United States*, 366 U.S. 393, 401 (1961). This is true even though a recruiter and recruit may each sign an enlistment contract agreeing to its contents. Only statutes, and not contracts, govern entitlements to compensation. *Id*. Consistent with this decision, which stems from a doctrine appearing in a Supreme Court opinion as far back as 1856, *see Walton v. Cotton*, 60 U.S. 355, 357 (1856), the Federal Circuit has ruled that statutory law exclusively controls military compensation and benefits, thereby precluding implied-in-fact contract claims for such benefits in court. *Schism v. United States*, 316 F.3d 1259, 1264 (Fed. Cir. 2002). Thus, Mr. Greene's assertion of contractual entitlement is no basis to reconsider the decision entering judgment against him on the student loan repayment claims. *See Miller v. United States*, 58 Fed. Cl. 540, 542 (2003) (holding that current SLRP program "is not a matter of contract right").

There did exist, however, the possibility that a statute or regulation governing the SLRP could provide the money-mandating basis for Mr. Greene's repayment claim. Mister Greene's submission is deficient in this regard, as no information is provided concerning the operation of this program. Taking into account Mr. Greene's *pro se* status, and the fact that the ABCMR denied these claims *sub silentio*, the Court ordered a response from the government, specifically to "include a discussion of the terms and conditions of the student loan repayment program as it existed at the time of plaintiff's service, whether such claims are within the ABCMR's jurisdiction, and when the statute of limitations period would have begun for such claims." Order (Mar. 28, 2006). The government's response included an appendix containing Army Regulation ("AR") 135-7, effective February 1, 1984 and governing the Student Loan Repayment Program as it applied to Mr. Greene. *See* App. to Def.'s Resp.[3]

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[3] Mister Greene enlisted in the Army National Guard on September 22, 1981. *See* Admin. R. Add. at 324-32. Army Regulation 135-7 applied to, among others, personnel enlisting

The SLRP provisions of AR 135-7 were adopted under the authority of section 902 of Public Law 96-342. *See* AR 135-7, § 5.1-1(a), App. to Def.'s Resp. at 12. This statute permits the Secretary of Defense to repay student loans, but does not require that he do so. *See* Pub. L. No. 96-342, § 902(a)(2), 94 Stat. 1077 (stating that the Secretary "*may* repay loans")(emphasis added). Thus, plaintiff's entitlement to payment, if any, must be found in the regulations. It appears from AR 135-7 that enlisted personnel who selected participation in the SLRP did become entitled to its benefits while AR 135-7 was in force, but only while serving as an enlisted person. *See* AR 135-7, § 5.1-6(g). Thus, Mr. Greene's participation would have terminated on February 25, 1988, when he was commissioned as an officer. *See* Admin. R. at 50. It also appears that Mr. Greene's entitlement to repayment would have accrued at each anniversary date of his enlistment. *See* AR 135-7, § 5.1-8(b) ("Entitlement will be calculated on the anniversary date of the contractual commitment."); *see also* Pub. L. No. 96-342, § 902(b) (providing that repayment of loans is based on "each year of service"). On this basis, the government contends that Mr. Greene's six claims for loan repayment would have accrued on September 22 of the years 1982 through 1987. Def.'s Resp. at 4-5.

The Court agrees with the government's interpretation of AR 135-7. A six-year statute of limitations applies to claims under the Tucker Act. 28 U.S.C. § 2501. This period is not tolled while a claimant pursues remedies before a correction board, nor does a correction board decision revive the limitations period of a stale claim. *See Martinez v. United States*, 333 F.3d 1295, 1303-05, 1311-14 (Fed. Cir. 2003). While it might possibly be within the equitable powers of the Secretary of the Army, acting through the ABCMR, to decide to correct an injustice in a manner that results in paying a debt whose limitations period has run, *see* 10 U.S.C. § 1552(a)(1), this Court is barred from entertaining claims that had accrued more than six years prior. *See* 28 U.S.C. § 2501. As the last of Mr. Greene's six claims under the SLRP would have accrued on September 22, 1987, he needed to file his lawsuit within six years of that date under the limitations period. But even his initial suit filed in the United States District Court for the District of Connecticut would have been nearly two years and nine months too late to recover repayment under the SLRP. *See* Admin. R. Add. at 238-39 (complaint filed June 20, 1996).

Mister Greene has not shown either a change in applicable law or that previously unavailable evidence bearing on this matter has since become available. *See Griswold*, 61 Fed. Cl. at 460-61. Nor can it be said that a manifest injustice would occur absent reconsideration of his claim for repayment of student loans, *see id.*, as the limitations period on his claim has long run. His motion for reconsideration of this claim is accordingly DENIED.

C. The Motion to "Reconsider Dismissal of Due Process Violations"

Mister Greene has also moved for reconsideration of what he terms was "the dismissal of due process violations." Mot. to Reconsider Dism. of Due Proc. Viols. at 1. He noted that

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between October 1, 1980 and September 30, 1981. *See* AR 135-7, § 5.1-1(a), App. to Def.'s Resp. at 12.

"[t]his Court by its own admission [was] not the correct venue for adjudicating due process violations" and states that the Court "must reconsider its dismissal of due process violations against the Plaintiff by the Defendants." *Id.* Plaintiff requests that the Court "should remand these elements of the Plaintiff's case to the District Court for adjudication." *Id.*

Mister Greene's *pro se* status may excuse his use of the word "remand" instead of the correct term "transfer" (for district courts are of equal standing with ours), but it cannot supply the grounds for his motion. His complaint consisted of a large variety of claims, many of which were not within this court's jurisdiction. *See Greene*, 65 Fed. Cl. at 378-82. But even construed with the lenity afforded to *pro se* litigants, it did not contain any claims under the Due Process Clause of the U.S. Constitution. Under cause of action, Mr. Greene stated: "I allege that the following of my constitutional rights, privileges, or immunities or my rights under federal statute have been violated and the following facts form the basis of my allegation." Complaint at 2. He then listed four claims, violations of "AR 135-91," "AR 27-10," 10 U.S.C. § 1552, and "42 U.S.C." *Id.* This was followed by forty-three paragraphs of factual allegations, none of which appear to involve the Due Process Clause. *Id.* at 2-18.

The Court will not re-transfer any claims back to the Connecticut district court, for another basic reason: that court has already determined that no claims within its jurisdiction were contained within Mr. Greene's complaint. Mister Greene had initially filed the very same complaint used in our court (with a different caption page) in the Connecticut district court. The district court dismissed the complaint for lack of jurisdiction, finding it consisted of two categories of claims: Tucker Act claims, which it determined were above the limit on district court jurisdiction, *Greene v. United States Army Reserve*, No. 3:00 CV 2480, slip op. at 5 (D. Conn. Sept. 26, 2002); and tort claims, which it determined cannot be based on "injuries arising out of the course of activity incident to military service. *Id.* at 6 (citations omitted). Our court is not the forum for second-guessing or appealing decisions of United States district courts -- if Mr. Greene did not agree with the district court's determinations, his recourse was to appeal the decision to the United States Court of Appeals for the Second Circuit.

Moreover, transferring a portion of Mr. Greene's case back to the district court would not seem to be an option under federal law. The transfer statute allows this court to transfer an action "to any other such court in which the action . . . could have been brought at the time it was filed." *See* 28 U.S.C. § 1631.[4] But if Mr. Greene's non-specified Due Process Claim were based on the same facts supporting the Tucker Act claims, and sought, in part, monetary damages -- as Mr. Greene asserted a claim for punitive damages -- then the existence of these claims in a district

[4] 28 U.S.C. § 1631 states: "Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."

court case that was deemed filed at the same time (or earlier) than the case in our court would deprive our court of jurisdiction over his claims. 28 U.S.C. § 1500;[5] *see Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004). For all of these reasons, Mr. Greene's motion is DENIED.

D. The Motion Concerning Additional Back Pay

In its prior opinion, this Court denied the government's motion for judgment on the administrative record concerning Mr. Greene's claims for the higher pay he should have received due to his retroactive promotion to the rank of First Lieutenant, and for money deducted from his pay relating to drills he performed from July 1991 to January 1992. *Greene*, 65 Fed. Cl. at 383-84. Although the record was barren of the information needed to calculate the size of these claims, as well as of any explanation for their denial, *see id.*, during a status conference with the parties the Court determined that a remand to the ABCMR was not necessary. Each party was provided the opportunity to submit documentation supporting its calculation of the money owed Mr. Greene under these two claims. *See* Order (Aug. 1, 2005).

The government had initially submitted two status reports. The first one, filed August 17, 2005, was accompanied by a declaration from the responsible DFAS official, and 141 pages of records upon which rested the calculation that Mr. Greene was owed an additional $3,195.05 in back pay. *See* Def.'s Status Report (Aug. 17, 2005). A supplemental status report was filed shortly thereafter, explaining the government's calculation that an additional $63.60 in compensation for assessed fees and charges was owed Mr. Greene. Def.'s Suppl. Status Report (Aug. 26, 2005). This supplemental report was accompanied by a declaration from another DFAS official, and the two pages of pay records upon which it rested. *See* Att. to *id.*

After some delay, Mr. Greene filed what was styled a "Motion to Submit Plaintiff's Back Pay Calculation." Mot. to Submit (May 30, 2006). This consisted of a two page explanation of his calculations,[6] and a two-page spreadsheet containing his calculations. *See id.* & Ex. 1. Mister Greene alleges that, in addition to the two sums already calculated and paid to him by defendant, he is owed $1,123.83. Ex. 1 to *id.* at 2.

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[5] 28 U.S.C. § 1500 states: "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

[6] Mister Greene's motion also contains an intemperate accusation against government counsel, which is not appropriate for a paper filed in our Court. *See* Mot. to Submit at 2. Mister Greene is cautioned that his use of similar language in a document in the future may result in the document being stricken from the record and in the imposition of monetary sanctions against him. *See* RCFC 11, 12(f).

In its response, the government proposes that Mr. Greene's motion be treated as a motion for judgment on the administrative record, and to that end consents to supplementing the record with Mr. Greene's calculations. Def.'s Resp. at 1. It also requests leave to file a supplemental audit report, in the form of an attached declaration and supporting documentation. *Id.*; *see* App. to Def.'s Resp. (Second Burkhardt Decl.). The Court finds both requests warranted, and thus they are GRANTED.

The government in its response concedes that Mr. Greene is owed an additional $236.46 in connection with drills performed during the period August 8-21, 1992. Def.'s Resp. at 2, 4. It also states a willingness to settle an additional $199.22 for Basic Allowance for Quarters, provided Mr. Greene can produce evidence (such as a voucher) supporting this claim. Def.'s Resp. at 4-5; App. to *id.* ¶ 2(a). The government contends that the remaining items of the additional back pay claimed by Mr. Greene are either already encompassed in the amounts paid to him, or are not sufficiently identified. Def.'s Resp. at 4-5 & App. Reviewing the documents already on file, the Court agrees that additional information and explanation from Mr. Greene is required to determine his entitlement to the additional amount claimed (above the $236.46 conceded by the government). Accordingly, Mr. Greene is given sixty (60) days from the date of this order in which to make a supplemental response, addressing the points raised in the government's response.

III. CONCLUSION

For the foregoing reasons, this Court DENIES Mr. Greene's motion for reconsideration of the Court's decision concerning the student loan repayment claim, and DENIES his motion to transfer claims back to the district court. The Court GRANTS Mr. Greene's motion to add his calculations to the record, and the government's motion for leave to file the supplemental audit of Mr. Greene's records. Mister Greene shall file a supplemental response addressing the government's response to his back pay calculation, including any remaining evidence in support of his additional back pay claims, within sixty (60) days of the date of this order.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge